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Public Interest in Patent Protection: The Need of Criteria

Winner Sitorus
Lecturer at Faculty of Law, Hasanuddin University
Perintis Kemerdekaan Km.10 Tamalanrea, Makassar – 90245, Indonesia

Abstract
This paper aimed at studying provisions in TRIPs Agreement and Law Number 14 of 2001 regarding Patent, particularly provisions reflecting criteria of public interest. The approach used is statutory and conceptual approaches by analyzing TRIPs Agreement and Law Number 14 of 2001. It is concluded that public interest has been stipulated generally in TRIPs Agreement and Law Number 14 of 2001 in their provisions regarding kind and scope of the use of limitation and exception of patent holder's exclusive rights. Law Number 14 of 2001 basically has implemented limitation and exception provisions stipulated in TRIPs Agreement. However, unfortunately it does not provide further and clearer elaborations on some provisions that need to be elaborated further. In addition, both TRIPs Agreement and Law Number 14 of 2001 do not provide criteria as to public interest.
Keywords: Public Interest, Criteria, Exception, Limitation, Patent.

1. Introduction

The protection of human's intellectual works in the form of intellectual property rights – for the rest mentioned as IPR – has been recognized and ruled internationally and nationally through conventions or treaties and national laws. The grant of patent by state, as one form of intellectual property rights, to an invention constitutes an award to an inventor. (Oentoeng Soerapati 1999). Patent gives an exclusive right to patent holder for certain period of time to use his or her invention by himself or herself or to give license to another party to use it.

In its development, however, it is undeniable that the utilize and the use of exclusive right by IPR holder, including patent holder, has raised problems of economic justice and conflict of interest, which can raise tragedy of the anti-common (Michael A Heller 1998) and in turn it can threaten the sustainability of human life. The existing legal frameworks seemingly do not provide appropriate framework to guarantee the just utilize and use exclusive rights in order to protect the public interest. Trade Related Aspects of Intellectual Property Rights (TRIPs), as international legal framework of IPR, is less ensuring in guarantying the balance of the protection of IPR holder's exclusive right and public interest, so its implementation has raised many problems (David Vaver & Lionel Bently eds 2004).

The exclusivity of IPR is frequently used or placed above or exceeding public interest, which in fact constitutes justification of the grant of the exclusive right. This inconsistency is caused by what Drahos called the "danger of the inner logic" of the exclusive right (Peter Drahos 1996). The excessive exploitation exclusive right through IPR may raise *social unjust* (Anupan Chander & Madhavi Sunder). Even though most of TRIPs provisions are devoted to protect private interest, TRIPs also gives a room for public interest protection. However, the meaning and criteria of public interest itself are not stipulated further in its provisions, but it is delegated to each member states. Therefore, it may raise multi-interpretaiton to the meaning of public interest. In order to avoid multi-interpretation to the meaning of public interest, which is difficult to define, it could be made by finding the criteria of public interest that in turn will ease its rules making. With the appropriate criteria of public interest then public interest in patent protection will not make a state acts arbitrarily to patent holder and contrarily the interest of other parties also protected. Therefore, an effort to find the criteria of public interest in patent laws, either existing internationally or nationally, should be made.

II. Justification and Criteria of Public Interest in Intellectual Property Right Protection

A. Justification of Public Interest in Intellectual Property Right Protection

Public interest consideration in the grant of patent protection has normative, constitutional, and philosophical justifications. Normatively, public interest consideration has been stipulated in conventions, treaties, and laws in field of patent. Constitutionally, public interest can be seen in the goal of state. Philosophically, public interest can be studied from opinions regarding principle of the balance of right and obligation and principle of justice.

Internationally public interest consideration has been stipulated in TRIPs Agreement and Paris Convention. In national context, it has been stipulated in Law Number 14 of 2001 regarding Patent (for the rest mentioned as Law 14/2001).

In TRIPs, public interest reflected in Article 7 stipulating:

> *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and* ***in a manner conducive to social and economic***

welfare, and to a balance of rights and obligations.

This Article reflects the existence of public interest through the emphasis on the protection and enforcement of intellectual property rights should contribute to the transfer and dissemination technology by considering the balanced interest between producers and users of technology, and in manner conducive to social and economic welfare, and to a balance of rights and obligations.

Further in *Article* 8, TRIPs firmly stipulates public interest consideration in IPR protection, stipulating that:

1. *Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote* ***the public interest*** *in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.*
2. *Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology*

It is clear that this Article gives each member of WTO have a possibility to adapt measures necessary to protect health and nutritions, and to promote the public interest in sectors of vital importance to its socio-economic and technological development, as long as that such measures do not contravene the provisions of the Agreement. Despite all measures should be conducted consistent with the provisions of the TRIPs Agreement, this provision constitutes a firm recognition of rights of each WTO's member to protect public interest in its national IPR laws.

In Paris Convention, public interest reflected in its exception provisions. In Law 14/2001, public interest consideration also exists despite it does not use public interest phrase explicitly; instead it uses the interest of general community term. This is stated in consideration b Law 14/2001 that..."needed to create fair business competition climate and taking into account of the interest of society in generall." Further public interest or the interest of society in general stipulated in limitation and exception provisions.

Public interest in patent protection, as part of IPR, also can be anologized with justification of public interest in property because principally IPR, despite the existence of different opinion, has been accepted as a rezime of propery (Winner Sitorus 2014). In Article 6 Law Number 5 of 1960 regarding Basic Rule of Agrarian Subject Matters (for the rest mentiones as Law 5/1960) stipulated, that "All property rights of land have social function." In my opinion social function constitutes the embodiment of public interest in the use of right of property. Further in the elaboration of Article 6, it is stipulated that:

> "What ever title right of land owned by a person, it is unjustifiable, that his or her land will be used (or will not be used) merely for his own or her own interest, let alone if it will damage society. The land use must be adjusted with its condition and the nature of its right, so then it will give benefit either for the welfare and the happiness of its owner or for the benefit of society and state. However, in this provision does not mean that individual interest will be enterely set aside by public interest (society)."

According to Boedi Harsono (2007), the elaboration of that Article gives some descriptions as to the meaning of social function of land contained in Law 6/1960 (In my opinion social function constitutes the embodiment of public interest in the use of right of property), among others:

1. That social function of land covers all rights of land, either freehold title, building rights title, or other rights.
2. Social function in Law 5/1960 has a meaning that the utilization of land is not merely used for individual interest, let alone to harm society. This thing contains a meaning that the use or utilization of land needs the existance of regulation ensuring the embodiment or achievement of common interest.
3. Social fuction is not set to eliminate the interest of land owner, but it must be set equally....

From the elaboration of the article and descriptions described by Boedi Harsono above, if it is related to the utilization of IPR then it may be analogized that the utilize of IPR by IPR holder is not merely for his or her own interest, let alone damage society. Therefore it is necessary to have arrangement of IPR utilization that guarantying the embodiment of common interest. Public interest in IPR protection does not eliminate the interest of IPR holder, but it must be set equally.

The same idea also stipulated in Law Number 39 of 1999 concerning Human Rights. In Article 36 stipulated that:

(1) Everyone has the right to own property, both alone and in association with others, for the development of himself, his family, nation, and society through lawful means.
(2) No one shall be subjected to arbitrary or unlawful seizure of his property.
(3) The right to ownership has a social function.

Further in the elaboration of Article 36 section (3), stated that what is meant by the right to ownership has a social function is that "every the use of freehold title must take into account public interest. If it is needeed

by public interest then the right to ownership may be revoked in accordance with the laws." If this provision related to IPR, then exclusive right of IPR holder as an embodiment of personal property in its use is limited by public interest. If public interest in need, in accordance with the existing laws, exclusive right of IPR holder may be revoked.

Public interest also has a justification in Indonesia economic constitution that is UUD 1945 (Indonesian Fundamental Constitution of 1945), which basically constitutes the embodiment of Pancasila (Five Basic Principles) values. Pancasila principles are embodied in the Preamble of UUD 1945 containing the main ideals of the state, that are The state is based on God the Almighty according to civilised society within the framework of the Indonesian union state; The state has sovereignty based on representative society; The state manifests social justice for all Indonesians; and The state provides protection for all Indonesians and territory based on unity. Therefore, Pancasila and Preamble of UUD 1945 may be considered to be the axiom of Indonesian legal endeavours, e.g. managing Intellectual Property, which covers several aspects that are legal objectives, legal resources, social justice, and legal protection.

The first main ideal, 'the state is based on God the Almighty according to civilised society within the framework of the Indonesian union state', refers to the legal objectives, which govern society's interests (emerging rights and duties) as determined by God. In this case, law emphasizes the importance of a balance being struck between rights and duty. This is the basis for social justice. It means that rights cannot surpass an obligation. Likewise, an obligation cannot overwhelm a right. Every person has a right to obtain what he or she needs in fulfilling his or her needs in life. Every person has an obligation to provide what he or she can give to others who need it in order to maintain and nurture their survival. In this respect, the harmonious relationship authorities and powers are based on rational and transparent principles within the framework of existing Indonesian laws. Thus, it requires legal protection.

The second main ideal, 'the state has sovereignty based on representative society', refers to legal resources which contain the characteristic of formal logic. They are manifested in the form of the state as the organisation of the power of the people and democracy based on consensus (*musyawarah*) in the form of wisdom. The State, as the power organisation of the people, has rights and obligations to regulate vital and strategic commodities, including the utilization of Intellectual Property in order to fulfil the needs of individuals, the community and the state. Management in utilizing Intellectual Property should be regulated by the state. This is because the state has authority and sovereignty to adopt necessary policies and actions to achieve the ultimate goal of society.

The third main ideal, 'the state manifests social justice for all Indonesians' refers to social justice that might cover a broad range of justice, such as distributive justice, commutative justice, corrective justice, legal justice, and the collective protection of life. The balance between rights and obligations as mentioned in the first main ideal is the basic requirement for achieving social justice. However, the achievement should be manifested in an orderly fashion through formal methods as mentioned in the second main thought. The embodiment of the concept into positive laws may concern Rawlsian justice (John Rawls 1999) that emphasizes the fairness principle. Under the theory of *Rawlsian Justice*, the standardization and harmonization of IP laws based on the principle of '*one size fits all'*, without taking into account social and economic inequalities can be considered unjust.

The fourth main ideal, 'the state provides protection for all Indonesians and territory based on unity' refers to legal protection aspect. It refers to the State's authority in regulating rights concerning Intellectual Properties and their protection. Providing legal protection should manifest justice as mentioned in the third main ideal. Accordingly, protecting creativity and productivity must be dedicated to achieving the collective goal without damaging individual interests. On that ground, the state should protect the existence of any party, as long as the related parties - individuals and groups- recognize each other's existence.

From the above explanation it can be concluded that according to ideals and goals of the state as contained in Preamble of UUD 1945, legal protection of rights owned by individuals, including IPR, raises right and obligation. That protection requires the balance between right and obligation in its use. Accordingly, the state should regulate the utilization of IPR that can guarantee the fulfilment of the individual's, society's, and state's interests in order to achieve the common goals, that is social justice. Therefore, the protection of individual interest conducted without denying the interest of achieving the common goal.

Public interest in IPR protection may also justified based on justice principle. The stipulation of IPR protection should be conducted fairly. According to Van Apeldoorn (2001), the fair rule is the rule that gives the balance between the interests of person and society that are protected. In the context of IPR, it may be concluded that protection rules of IPR should take into account the balance between the interest of IPR holder and the interest of public so that justice may be achieved.

IPR protection must also be able to ensure fairness in the distribution and utilization of IPR products, particularly for those parties that have less capacity in accessing and utilizing them. In this respect, Rawls's justice principle may used to be a justification. Justice principle developed by John Rawls applied particulary to

basic structure of society, managing the transfer of right and obligation, and managing the distribution of economic advantages.

John Rawls who is well known with his justice as fairness theory, which also contains distributive justice concept, states two principles of justice. First, the greatest equal libery principle that each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties of others. Second, social and economic inequalities are to be arranged so that they are both reasonably expected to be everyone's advantage (difference principle) and attached to positionss and offices open to all (principle of equality of opportunity).

Rawls's justice principle is relevant to be a justification in the granting equal opportunity to have property, including IPR. This is related to firt justice principle of Rawls. However, it must be taken into account that in this recent context, IPR has been used by its holder (particularly big companies) to be an asset to get economic advantages as much as possible. Related to this respect, Rawls's second principle of justice may be used to be a justification of public interest in IPR protection. IPR system ensure the freedom of every individual to have IPR, however it must also consider the interest of society, particularly society that least advantaged, which can not survive without special treatment.

According to Rawls's justice theory, standardization and harmonization IPR laws based on "one size fit all" principle, without taking into account social and economic inequalities can be unjust (Peter Drahos 2005). Rawls's distributive justice theory frequently is similirazed with social justice theory (Sudhir et al. 2004). In IPR context, based on Rawls's justice theory, it is necessary that state to be involved more directly in organizing more egaliter society.

This analysis shows that public interest in IPR protection, including patent, has a strong normative, constitutional, and philosophical justifications.

B. Public Interest Criteria

Determining standard or criteria of public interest is not easy, because public interest itself is unclear concept so it is difficult to define it. This is as stated by Kalo (2004) that public interest is difficult to be defined conceptually, moreover if it is seen operationally. Likewise A.P. Parlindungan (1994) stated that "...public interest criteria is very flexible so it is too broad..., then it is difficult to describe the meaning of public interest.

In order to prevent that public interest is not to be interpretated arbitralily by government, it is necessary to have criteria that must be obeyed by government and it is legally defendable. The good criteria of public interest can be determined if it refers to universal requirements that must be exist in public interest. The main requirement that underlining all public interest requirements is the ideals and goals of state stipulated in Preamble of UUD 1945. State ideals are to embody people, nation, and state that are free, unified, sovereign, just, and prosperous. In another side, the goals of state are to protect people, the whole citizens and land, promoting general welfare, and to embody the intellectual life of the nation. The ideals and goals of the state determine the state to achieve justice, unity and oneness, prosperity and welfare of people, and to protect all Indonesian people.

Refering to the study based on the existing laws, judiciary decision, and scholar's opinion; there are some conditions that can be used to determine the criteria of public interest in IPR protection (Winner Sitorus 2014), as follow:

a. Protection in public health and nutrition;
b. Economic social and technology development;
c. Taking into account the balance of right and obligation between IPR holder and IPR user;
d. Not contravening fair business competition;
e. Non-commercial use;
f. The use for education, research and development, experiment, and science;
g. For defence and security use
h. For Emergency Need
i. The existence of adequate compensation
j. Utilization by Government
k. Stipulated in laws by Government (state intervention)

From some conditions mentioned above, the criteria of public interest in IPR protection can be determined that are the involment of state through laws, the use of IPR (for society, state, and fair business competition), and the granting of adequate compensation for IPR holder.

Those public interest criteria legally have a binding force if they have been stipulated in the laws and can be used by judges in deciding a case relating to the use for intellectual property for public interest. In the arrangement of IPR internationally and nationally, particularly relating to Patent, generally the public interest criteria embodied in exceptions and limitations provisions. However, besides those provisions, it can also be seen in provisions constituting the embodiment of public interest.

III. Public Interest in Patent Protection

Public interest criteria in patent protection basically can be abstracted from Paris Convention, TRIPs Agreement, and Law 14/2001 provisions. Since Law 14/2001 basically constitutes the implementation of Paris Convention and TRIPs Agreement, then the analysis of this paper only focuses on its provisions reflecting public interest criteria in patent protection.

The criteria of public interest in patent protection contained in Law 14/2001 are reflected in exception and limitation provisions and some other provisions. First, in Article 7 it is stipulated that a patent shall not be granted to (a) an invention regarding a production process or product that the publication and use or implementation of which is contrary to prevailing laws and regulations, public order and morality; (b) Any method of examination, treatment, medication, or surgery applied to people and animals; (c) An invention regarding a theory or method in the field of science and mathematics; and (d)(i) Any living creature, except microorganism and (ii) essentially biological processess for production or propagation of plant or animal, except non-biological or microbiological processess.

Article 7 of Law 14/2001 basically is in line with the provision stipulated under Article 27 (2) and (3) of TRIPs Agreement. Substantially, there is no problem with this limitation. However, there is a problem with what is it meant by contrary to the prevailing laws. There is no further elaboration as to the phrase. It is different with Australia, even thoug there is no definition in laws concerning contrary to the prevailing laws phrase, this matter stipulated in Examiner Manual Book (Nurul Barizah 2010). In addition to providing definition and elaboration concerning the term, the Book also provides examples of inventions that may be categorized to be "contrary to the laws." In the absence of elaboration or manual book, the determination whether an invention is contrary to the prevailing laws may be seen through written specification and claim submitted.

The similar problem also exists in determining the definition of "public order" and "religious morality." There is also no definition of the term in Law 14/2001 and its Explanantory Memoranda. Therefore, in determining the definition of the term depends on the Patent Office officials's interpretation and Commercial Court judge. The unavailability of Manual Book or another book will make Patent Office employee and commercial court judge will have difficulty in interpreting the meaning of the term. In order to overcome this matter, it is necessary that Indonesian Government issues governmental regulation or manual book that can be used to be guidance in determining and categorizing kinds of invention considered contravening the prevailing laws, religious morality, and public order.

Indonesian Government may adopt the definition of public order used by European Patent Office and Article 27 (2) of TRIPs Agreement that public order in relation with patent is a condition related to security and protection of human, life of animal and plant, and environment. Therefore inventions that may arouse riot or chaos, criminal action, and endanger the life of human, animal and plant, and destroy environment should not be granted patent.

Another problem related to Article 7 is unpatentability of inventions related to living creature, including human, animal or plant. In General Explanatory Memoranda of Law 14/2001, elaborated that provision stipulated in Article 7 (d) is meant to accomodate society's suggestion so that invention of living creature can not be granted patent. The question that may arouse from the above provision is whether invention related to part of living creature, e.g. gene, can be patented. Looking at the provision of Article 7 d (i) above it may be interpreted that what is excluded from the patentability of an invention is human, animal, and animal as whole. Therefore, if only part of living creature then it can be granted patent. So an invention related to gene can be patented, likewise part of plant in form of plant variety can be protected by Plant Variety Protection. If this interpretation may be accepted, then it will cause problems related to the prevailing morality and religion values.

The provision of Article 7 d (i) can not be seperated from the problem of human dignity. This provision can not be separated from the development genetical engineering in western countries arousing ethical problems related to biotechnology and its arrangement or regulating. However, it is unfortunate because the giant companies (multinational companies) campaigning to seperate ethical issues from biotechnology. According to Suman Saha ethical concerns are largely a luxury of developed countries. Therefore, developing countries should not just follow the moral dilemmas of the North, but should balance the ethics of biotechnology against the ethics of poverty. Clearly, Sahai (1997) is trying to localise ethical concerns only for developed countries and to ignore ethical concerns for developing countries because they cannot afford to do this due to lower economic and technological development. She argues that the concern of bioethics is essentially a Western phenomenon. The objections to biotechnology in Western societies might be logical for their context and economic situation. These countries have a certain standard of food availability and choice that perhaps cannot be improved. They even have to spend large sums of money in destroying the mountains of surpluses of fruits and vegetables, the lakes of milk and wine and the stacks of meat and butter. Such opinion represents opinion of biotechnology industry stating that for hungry people ethic and security are not relevant. Separation ethic from technology and economic policy is western society ideas.

The opinion of Sahai is not surprising, because in the conventional ethical discourse, intellectual

property regimes have been described as asserting the natural or deontological rights of the individual to a limited extent, but ultimately pursuing a utilitarian goal (Orit Frischman Afori 2004). Deontological rights refer to humanistic values. In this view, even though concepts such as dignity and identity of a human being are underlying values, they are not rights as such. They serve as guidelines for interpreting rights (W. Grosheide ed. 2010). The principle of respect for human dignity associated with patents indicates the concern aroused by certain developments in the fields of human genetics and medicine. Even though the connection between human rights and patent law is quite recent, the concept of the inherent dignity of the human person is well established, both in international and Indonesian law. The link appeared for the first time in the European Community in the proposal for a EU Biotechnology Directive in 1988, which stated that "processes for modifying the genetic identity of the human body for a non-therapeutic purpose which is contrary to the dignity of man" are unpatentable (an implicit reference to cloning and chimera production, etc.). It is also stipulated in Article 7 of Law 14/2001, and Article 28 of UUD 1945 (the 4th Amendment, 2002), which protect fundamental rights including human dignity.

Principally, considering and including the criterion of human dignity in a patent discourse does not overstep the appropriate role of the state. Therefore, a humanistic approach might lead to some significant limitations to and restrictions on the expansionary tendency in patent law. A humanistic approach is predicated by the centrality of protecting and nurturing human dignity. This requires that the subject-matter of patent law is limited when human dignity is at stake and that a proposed invention is denied patent protection if it is inconsistent with the inherent dignity of the human person. Therefore the provision of Article 7 d (i) should be amended. Indonesian Patent Law must firmly and explicitly determine that human gene or DNA is unpatentable, with technical consideration because leaving creatures have the natural characteristic self replication and the consideration of moral and religion values existing in Indonesia. This idea has a strong enough foundation by looking at the patentability of genes in United States arousing debates and different opinions in judicial decision in technical aspect. In Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 702 F. Supp. 2d 181, 184 (S.D.N.Y. 2010), Judge Sweet shocked patent communityy through his decision refusing thousands of genes patent issued by USPTO (United States Patent and Trademark Office) for three decades.

Despite the existence of unclearness in provision Article 7 Law 14/2001, however the provisions of this article can be used to be foundation for public interest protection. This provision basically constitutes the honor of morality and human dignity. In relation with public interest criteria, this provision relates directly with state intervention criteria.

Second, the provision of Article 16 (3). The provision of this article stipulates that it is not a breach of exclusive right of patent holder for the use of patent is for the education, research, experiment, or analysis, as long as it does not harm the normal interest of the patent holder. This provision purportes to give opportunity for parties who truly in need to use an invention merely for research and education (Explanatory Memoranda of Article 16 (3) Law 14/2001). The arrangement of limitation for education, research, and experiment reasons is consistent with provision Article 30 TRIPs. This provision implicitly also reflects the existence of the recognition of human rights in respect of access to information from the side of patent user and protection of property (patent) from the side of patent holder. Thus this provision implicitly reflects a public interest criterion that is the use of IPR for society.

Third, the provision of Article 71 (1) stipulating the content of license agreement. This article requires that a license agreement shall not contain provisions that may directly or indirectly to be detrimental to the economy of Indonesia, or contain restrictions which hamper the capabilities of the Indonesian people to master and develop technology in general and particularly with respect to invention for which patent has been granted. Formulation of this provision is too broad, either from the aspect of legal certainty of technology transfer through license agreement, or the aspect of public interest protection through the restriction of license agreement content.

Considering the substance of Article 71 provision, it seems this article aimed to regulate unfair business practice. Unfortunately, however, it is not stipulated in detail, so it may arouse broad interpretation. Moreover in Explanatory Memoranda of this article it is stated clear enough. Thus it gives big opportunity to jugdges to interpret it if there is dispute in the future in relation with the license agreement. It is necessary to make exclusionary and limiting provision concerning the substance of license agreement so it will provide legal certainty in the utilizationn of technology and public interest protection. If it is not done, it will harm every party, including foreign investor in utilizing its patent through license agreement. As a comparison, in Australia patent license stipulated in the Patent Act 1990 and the Trade Practice Act 1974 in detail. Indeed in United States the Government regulates the granting of license in some legal means that are: Competition Law (federal law), Misuse Law (related to some IPR laws), Public Policy Doctrine, and Preemption Doctrine that is constitutional doctrine to protect federal government laws from the intervention of state laws (John W. Schlicher 1996).

Despite its general and unclear formulation, this provision constitutes the embodiment of public interest because it prevents the abuse of exclusive rights by right holders, which in turn it will give impact to consumer

and state.

Fifth, the provisions of Article 74-87 stipulating Compulsory License. Compulsory shall mean a license to implement a patent which has been granted based on a decision of the Directorate General based on an application (Article 74). To be granted compulsory license, a request should fulfill some requirements, that are: the relevant patent has not been implemented in the Republic of Indonesia or only partially implemented by the patent holder (Article 75 (2); the relevant patent has been implemented by the patent holder or the licensee in a form and manner that contravenes the public interest (Article 75 (3)). The provision of Article 75 (3) also related to Article 91 c, stipulating that if within a period of 2 (two) years since the grant of the compulsory licence, it proves that the continuing patent implementaton in the way and form that damage public interest can not be prevented, the paten can be cancelled through a lawsuit. In addition to the requirement, an applicant also should fulfill other requirements, that are: the person submitting such application can provide convincing evidence that he has the capability to personally and fully implement the relevant patent; he has his own facilities for the immediate implementation of the relevant patent; he has made efforts in a sufficient period of time to acquire a license from the patent holder on the basis of normal terms and conditions but did not succeed; and the Directorate General is of the opinion that relevant patent may be implemented in Indonesia on a feasible economic scale and may benefit to the majority of the society (Article 76 of Law 14/2001). Further it is stipulated that further provisions regarding compulsory licenses shall be regulated by a Government Regulation (Article 87 Law 14/2001).

Unfortunately that until nowadays the said government regulation has not been issued. In Indonesia, the grant of compulsory license to an applicant has never occured. An example of the practice of compulsory license granting based on an application can be seen United States, among others are compulsory license granted to *Microsof* to use two patents owned by *z4 Tecnologies* relating to *Digital Rights Management* system used by Microsof for Windows and MS Office software program; compulsory license granted to Direct TV to use Finisar's patent on integrated receiver decorders (satelitte set top boxes) for a royalty $ 1.60 per device; and compulsory license granted to Toyota to use three Paices's patents on hybrid transmission for a royalty of $25 per automobile (James Packard Love 2007).

The provisions of Law 14/2001 concerning the compulsory license reflect public interest in patent protection. From the grounds required for the grant of compulsory license are reflected public interest criteria that are the use patent for society, state, and not in contrary with fair business competition, adequate compensation, and state intervention.

Sixth, the provision of Article 99 stipulating the implementation of patent by Government. It is stipulated that if the Government is of the opinion that a patent in Indonesia is
very important for the defense and security of the State and for an urgent need for the public interest, the Government may implement the relevant patent itself. An urgent need for the public (national) interest includes, among others health sector such as medicines that are still protected by patent in Indonesia, which is needed to overcome widespread diseases. Likewise in agricultural sector, for example pesticides that are very needed to overcome the failure of national harvest caused by pest. As it is known, one function of patent is to ensure the sustainability of state economy and to manage the improvement of society welfare within the state (Explanatory Memoranda of Article 99 (1) Law 14/20001).

Further provisions regarding the implementation of patent by Government is further stipulated by Government Regulation Number 27 of 2004 concerning Procedures of Patent Implementation by Government. In Article 3 of the Government Regulation stipulated that the implementation of patent by Government in the very important condition for defense and security of state includes fire-arm, ammunition, military exploding material, chemical weapon, biological weapon, nuclear, weapon, and military apparatus. Whereas an urgent need for the public interest of a patent stipulated in Article 4, including pharmaceutical product needed to overcome widespread endemic disease, chemical product related to agriculture, or animal medicine needed to overcome pest and animal disease that widely spreading. This Government Regulation then followed by Presidential Decree Number 83 of 2004 concerning the Use of Patent by Government on Anti-Retroviral Medicines, which in its development then amended by Presidential Decree Number 27 of 2007 concerning the Amendment of Presidential Decree Number 83 of 2004, and at last amended by Presidential Decree Number 76 of 2012 concerninng the Implementation of Patent by Government on Anti-viral and Anti-Retroviral medicines. The reason of the issuing of this Presidential Decree is the urgent need to overcome HIV/AIDS and Hepatitis B diseases in Indonesia, so then it is necessary to continue dan to make broader policy on access to Anti-viral and Anti-retroviral medicines that until nowadays are still protected by patent. Kind of patent that implemented by Government based on the Presidential Decree Number 76 of 2012 is as figured in the following table (Appendix of Presidential Decree Number 12 of 2012).

Table: Name of Active Substance, Name of Patent Holder, Patent Number, Duration of the Implementation of Patent on Antiviral and Antiretroviral medicines.

No.	Name of Active Substance	Name of Patent Holder	Patent Number	Duration of Patent Implementation
1.	Efavirenz	Merck & Co, INC	ID 0 005 812	Until the end of patent protection, 7 Agust 2013
2.	Abacavir	Glaxo Group Limited	ID 0 011 367	Until the end of patent protection, 14 May 2018
3.	Didanosin	Bristol – Myers Squibb Company	ID 0 010 163	Until the end of patent protection, 6 Agust 2018
4.	Combination of Lopinavir and Ritonavir	Abbot Laboratories	ID P 0023461	Until the end of patent protection, 23 Agust 2018
5.	Tenofovir	Gilead Sciences, Inc	ID 0 007 658	Until the end of patent protection, 23 July 2018
6.	Combination of Tenofovir and Emtrisitabin - Combination of Tenofovir, Emtrisitabin and Evafirenz	Gilead Sciences, Inc	ID P0029476	Until the end of patent protection, 3 November 2024

Through this implementation of patent by Government, which is in fact constitutes another form of compulsory license, then Government gives opportunity to produce seven kind of generic medicines that are very important in the therapy of HIV and Hepatitis B. By this measure, it will ensure about 310.000 people who are living with HIV in Indonesia to have access on important medicines to continue or survive their lives. Certaintly the implementation of patent by Government is not only limitedd to *Antiviral* and *Antiretroviral* medicines, but it also can be done to other important medicines, such as *Tamiflu* medicine for avian influenza. Compulsory license through the use of Government is not only done by Indonesian Government but also by some countries in various part of world, among others Malasyia importing *didanosine* (ddI), *zidovudine* (AZT) and *lamivudine+zidovidine* (*Combivir*) from India, Taiwan using compulsory license to produce and to sell generic version of *Tamiflu*, Thailand importing from India and producing *efavirenz* locally (James Packard Love 2007).

The mentioned provisions reflecting public interest in respect of the recognition of human rights to health and food for people who are in need of health and food in one side and the recognition of property (patent) of patent holder in another side. In relation with public interest criteria, this provision reflecting the criteria of the use of IPR (patent) for society and state, and state involvement.

Seventh, the provision of Article 135. In this provision is stipulated two grounds of exception to crimina charge on patent infringement. First, relating to parallel import of pharmaceutical product (medicines). It is aimed at ensuring normal price and fulfilling sense of justice of pharmaceutical product that are very important for human health. This provision may be applied if the price of a product in Indonesia is very expensive compared to price legally existing in international market (Explanatory Memoranda of Article 135 (a) Law 14/2001). Second, manufacturing of a pharmaceutical product which is protected by patent in Indonesia within 2 (two) years before expiration of protection of the patent for the purpose of permission process to merchandize after the protection of the said patent is expired (Article 135 (b) Law 14/2001). The purpose of this exception is to ensure the availabity of pharmaceutical product by another party after the expiration of patent protection. Thus, the normal price of pharmaceutical product may be afforded.

The existence of Article 135 provision, however, does not mean that Law 14/2001 allows parallel import of pharmaceutical product protected by patent. Because under Article 130, it is stipulated that parallel import is criminal offense. That provision only excepted from criminal charge as stipulated in Article 118, giving right to patent holder or licensee to submit a lawsuit for damages through the Commercial Court against parallel import act. Thus, the aim of Indonesia to ease the importation of pharmaceutical products, as stated in Explanatory Memoranda of Article 135 (a), may be stunted by the provision of Article 118 (1).

Despite the implementation of Article 135 is restricted by the provision of Articles 118 and 130, the provision of Article 135, however, implicitly reflects public interest. This provision implicitly reflects public interest criteria in terms of the use of IPR (patent) for society and state, and the state intervention.

Eight, the provision concerning the patentability subject matter stipulated in Article 2 (1), stipulating that a patent shall be granted to an invention, which is novel, involves inventive steps and which can be applied in industry. Only invention fulfilling those requirements that may be granted patent provided that it does not

contravene Article 7. This provision reflects public interest in terms of public domain. Only invention that may add public domain can be protected, so it can improve development in social and technological sectors. This provision implicitly reflects public interest criteria in terms of the use of IPR (patent) and state intervention.
Ninth, the provision of Article 8 stipulating the duration of patent protection. This Article stipulates that a patent shall be granted for a period of 20 (twenty) years, which cannot be extended, commencing from the Filing Date. This provision is in line witht the provision of Article 32 TRIPs. The expiration of patent protection term makes the existing technology to be public domain. By the expiration of patent protection, then the public domain of invention and technology will increase. This provision implicitly reflects public interest in terms of the use of IPR for society and state.

The discussion above shows that public interest criteria, reflected in exception and limitation provisions, in patent as stipulated in Law 14/2001 based on some conditions. First, contravene the prevailing laws, religious morality, public order or ethics. Any process or product whose publication and use or implementation contravenes the prevailing rules and regulations, religious morality, public order or ethics shall not be granted patent. Second, function and aim of invention. Invention related to any method of examination, treatment, medication, and/or surgery applied to humans and/or animals shall not be granted patent. Third, the field of invention. The invention related to any theory and method in the field of science and mathematics, all living creatures and any biological process which is essential in producing plant or animal, shall not be granted patent. Fourth, selected use or utilization. The use or utilization of patent for the interest education, research, experiment, or analysis as long as does not damage the normal interest of patent holder, it is considered not to be an infringement of patent holder's exclusive right. Fifth, patent that has not beeen implemented and damaging public interest. In terms of patent has not been implemented or only partially implemented in Indonesia and its implementation in a form and manner that contravenes the public interest, then Government shall grant compulsory license based on an application. Sixth, in urgent situation. The Government may implement the relevant patent itself if the Government is in opinion that that a patent in Indonesia is very important for the defense and security of the State and for an urgent need for the public interest, that are health sector such as medicines for endemic diseases, agricultural sector such as pesticides needed to overcome the failure of national harvest.

Considering the aim and principles stipulated in TRIPs and provisions of Law 14/2001, it slightly can be concluded that normatively there is the balanced arrangement betweeen the interests of the protection of patent holder's exclusive right and the protection of patent user and public. It can not be denied, however, that the implementation of the balanced principle is still far from what to be expected.

The interaction betwee trade and IPR and access to medicines has caused the acceptance of *Doha Ministerial Declaration on the TRIPS Agreement and Public Health*), constituting the pressure from eighty states group, led by Africa Group, Brazil, and India (Susan K. Shell 2003). The Declaration explicitly stipulates that TRIPs can be implemented and interpreted in a manner which is supportive of public health by promoting both access to existing medicines and research and development concerning new medicines. For instance through parallel import. Therefore, TRIPs Agreement shall not be used to refuse a policy allowing parallel import on important medicines (Alan .O. Sykes 2002; Carolyn Deere 2009). In the end, developing countries failed to secure Unites States support for a legally binding agreement (Susan K. Shell 2003).

IV. Conclusion

Public interest in patent protection has normative, constitutional, and philosophical justificationns. The justification of public interest in patent protection based on public interest criteria in IPR protection, that are state intervention, the use of patent and adequate compensation or remuneration. Critera of public interest in patent protection is reflected in provisions stipulating compulsory license, term of patent protection, standard of patentability, limitation of invention that can be granted patent, non-commmercial use related to education, research and experiment, and the requirement of license agreement content.

Even though public interest in patent protection has legal standing both in international level and national level, in practice it is not always easy to implement it because the meaning of public interest is not defined explicitly. Therefore, in national level, it is necessary to define public interest explicitly in Indonesia Patent Law so that it will not raise various interpretations.

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The author was born in Bangil, Indonesia in 1966. He oobtained Bachelor of Law (S.H.) from Hasanuddin University, Makassar, Indonesia in 1990), Master of Laws (M.H.) from University of Indonesia, Jakarta, Indonesia in 1998, Master of Laws (LL.M) from Washington College of Law, American University, Washington DC, USA, in 2003, and Doctor of Law (Dr.) from Airlangga University, Surabaya, Indonesia in 2014. The author is specialized in International Private Law, Intellectual Property Law, Corporate Law, and Contract Law.